H

v.

THE QUEEN

HIGH COURT AUSTRALIA
BRENNAN, DAWSON, TOOHEY, GAUDRON & McHUGH JJ.
[F.C. 94/053]
17 NOVEMBER 1994

CRIMINAL PROCEDURE: *Jury trial - Summing up - Direction to jury - Allegation of parental animosity - "Copy-cat" suggestion - Whether these issues were left to the jury to consider.*

The appellant was convicted on two counts of unlawfully and indecently dealing with his adopted daughter, K, who was 12 years old at the time when the offences were alleged to have occurred in 1989. On appeal attention was directed to two possible reasons for doubting the truth of K's evidence. The first relates to the relationship between the appellant and his former wife with whom K ordinarily lived. The second, arising from K's delay until July 1991 in making a complaint, suggests her allegations were made in imitation of allegations by another child, Melissa, who had told K that she, Melissa, had been indecently dealt with. This was referred to as the "copy-cat" suggestion.

Held:

[1] In this case, the learned trial Judge left the evidence to the jury for their consideration, though he made the comment that these was nothing to suggest that K's evidence was affected by parental animosity. There was no error in making that comment. It gave the jury no direction. It withdrew no issue from their consideration. Counsel at the trial made no application for a redirection.

[2] The "copy-cat" suggestion was left for the jury's consideration. No error appears in his Honours' direction in this respect. Moreover, no objection to this part of the summing up was taken at the trial. The Court of Criminal Appeal was not asked specifically to consider it. That Court did not make any observation on the correctness or adequacy of the summing up on the "copy-cat" suggestion.

[Appeal dismissed]

Case referred to:
Reg v. Heyde [1990] 20 NSWLR 234 ***(refd)***

Legislation referred to:
s. 216 of The Criminal Code (Q.)
Domestic Violence (Family Protection) Act 1989 (Q)

For the appellants - Wellner & Chittenden
For the respondents - D. Field

JUDGMENT

Brennan, Dawson, Toohey, Gaudron & McHugh JJ:

The appellant was convicted on two counts of unlawfully and indecently dealing with a child under the age of 14 years. The offence was created by s. 216 of The Criminal Code (Q.) as it stood at the time of the offences charged. The complainant was his adopted daughter, K, who was 12 years old at the time when the offences were alleged to have occurred. The

indictment contained three other counts charging the appellant with similar offences when the complainant was 7 or 8 years old. He was acquitted on those counts.

The offences for which the appellant was convicted occurred during the Easter holidays in 1989 when K and her two brothers were visiting the appellant in Bundaberg. He had been living apart from his former wife K's adoptive mother, since 1979. There was no apparent motive for K to fabricate allegations against the appellant but, in this Court, attention was directed to two possible reasons for doubting the truth of her evidence. The first relates to the relationship between the appellant and his former wife with whom K ordinarily lived. The second, arising from K's delay until July 1991 in making a complaint, suggests her allegations were made in imitation of allegations by another child, Melissa, who had told K that she, Melissa, had been indecently dealt with. This was referred to as the "copy-cat" suggestion.

The question of parental animosity

The animosity between the appellant and his former wife was elicited in cross-examination of the wife. She said she had brought proceedings against the appellant on several occasions including the taking out of a protection order under the Domestic Violence Act (Presumably the Domestic Violence (Family Protection) Act 1989 (Q.)) after an alleged threat by the appellant to shoot her. She admitted that on occasion she may have said that he deserved to be in gaol. But it was never suggested to K that the animosity between her parents may have affected her evidence. Nor, for that matter, was it even put to her that she was conscious of any animosity at the time she made her complaint. As she was only 3 years old when her parents separated, she had no memory of their living together. The only evidence of her knowledge of the parental relationship appeared in an affirmative answer to a question whether her mother had told her the reasons why the parents had split up, but that answer was not pursued.

After Counsel had cross-examined the wife on the subject of her animosity towards the appellant, the trial Judge observed:

> You are just attacking her credit gratuitously about the long-standing animosity between her and the accused, things she might have said, and yet you haven't suggested a single thing to her about that she's supposedly made something up. It's quite irrelevant. It's a red herring. It's got nothing to do with whether or not these events took place. Nothing was put to the complainant to suggest her mother put her up to this, or assisted her in fabricating this story, was it?

Counsel accepted that this suggestion had not been put to the complainant. Later, when his Honour's attention was drawn to the judgments in *Reg. v. Heyde* [1990] 20 NSWLR 234, his Honour said this:

> I appreciate the difficulty that obviously if a child, for instance, is persuaded or cajoled into making a false complaint by, for instance, a mother motivated out of ill feeling towards a father, a stepfather or an ex-husband or whatever, then it's almost impossible to have any factual instructions as to that occurring. But I think if that's going to be put to a jury as a possibility, as a reasonable possibility or a possibility creating a reasonable doubt, then it must be explored in the evidence and not just the motive, but the possibility of that being done has got to be explored in the evidence, *albeit* that it may be very difficult.

Here, there was no relevant exploration of K's knowledge of parental animosity or of her motive in making the allegations against the appellant.

In his summing up the trial Judge said:

> I should tell you this, though: some considerable attention was given during the course of the evidence to details of the particular bitterness between [the parents] following upon their marriage break-down. Now, members of the jury, what you make of that is up to you, but really whatever the state of the bitter relationship might have been, that is really a matter between the two of them. It really has got nothing to do with [K]. There is no evidence to suggest that she was even fully aware of that bitterness. There is no evidence to suggest that any bitterness between them affected her in any way or acted on her mind in any way when she made complaints about the incidents of sexual molestation. So, you might think that is really not a manner which would concern you a great deal at all.

The Court of Criminal Appeal observed:

> What his Honour said about the absence of evidence connecting the parents' animosity with the girl's case was correct. Although she was asked some questions about the extent to which she had discussed her evidence with her mother, there was never any suggestion put to her, or to the mother, that the complaint about the father's conduct had its origins in, or indeed had any connection with, animosity between the mother and father.

Their Honours were right in making this observation. The relationship of parents might be relevant in some circumstances as tending to show a motive on the part of a child to make false allegations against one of them, but the relevance and admissibility of evidence of that kind necessarily depends on the circumstances of the case.

In this case, the learned trial Judge left the evidence to the jury for their consideration, though he made the comment that there was nothing to suggest that K's evidence was affected by parental animosity. There was no error in making that comment. It gave the jury no direction. It withdrew no issue from their consideration. Counsel at the trial made no application for a redirection.

The copy-cat question

K gave evidence that when she told Melissa about the appellant's indecent dealing with her, Melissa told her "to go tell everyone". Until she spoke to Melissa, K said, she had been "too scared to tell". In cross-examination of K, the following exchange occurred:

> Were the circumstances that she told you about that had happened to her exactly the same as the ones that had happened to you? - No.
>
> Were there any that were the same? .... No.
>
> None? ... No - well, she told me that it happened to her but it was much more worse.

Clearly enough, there was no copying of Melissa's actual account of the events in which she had been involved. In his summing up, the learned trial Judge directed the jury as follows:

> It was, of course, canvassed in the evidence as to whether or not she might have in some way copied her friend Melissa, in other words, a copy-cat type of complaint. 'It has happened to Melissa, therefore I will make a complaint that it has happened to me.' If you can see something in that, that is a matter for you. If you think that that possibility casts some doubt upon the believability of [K], then you may take that into account. If you think that is not relevant at all, then you may reject it.

The "copy-cat" suggestion was thus left for the jury's consideration. No error appears in his Honour's direction in this respect. Moreover, no objection to this part of the summing up was taken at the trial. The Court of Criminal Appeal was not asked specifically to con-

sider it. That Court did not make any observation on the correctness or adequacy of the summing up on the "copy-cat" suggestion.

There is no substance in any of the points which have been canvassed on this appeal. If, when the application for special leave to appeal was made, the case had appeared to be as devoid of merit as it now appears, special leave would certainly have been refused. Unfortunately, the case then appeared to focus more on the exclusion of evidence that might have been relevant and admissible in cases of this kind than on the summing up on the evidence given in the case.

The appeal is dismissed.